Supreme Court, U.S.
FILED

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No. 02 923

IN THE

Supreme Court of the United States

WALTER E. MCDONALD,

Petitioner

v.

EXXONMOBIL CHEMICAL COMPANY

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Walter E. McDonald
Pro Se
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Sugar Land, Texas 77479
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QUESTIONS PRESENTED

1. At the pre-trial stage, may a court grant summary judgment for an employer, and find that no jury could reasonably infer unlawful discriminatory employment practices, when a plaintiff-employee's case consists of: 1) a *prima facie* case of discrimination, and 2) the employer has admitted in deposition, and in employer documents, that its purported legitimate and non-discriminatory explanation for adverse action is false, fictitious and fraudulent?

Petitioner respectfully submits the answer must be "No," and the Opinion of the United States Court of Appeals for the Fifth Circuit must be reversed.

2. At the pre-trial stage, may a court grant summary judgment for an employer, and find that no jury could reasonably infer unlawful discriminatory employment practices, when the employer has admitted in deposition, and in employer documents, that the employer knowingly and willfully made a false, fictitious and fraudulent statement to the U.S. Equal Employment Opportunity Commission in violation of 18 U.S.C. § 1001 regarding the employer's explanation for adverse action?

Petitioner respectfully submits the answer must be "No," and the Opinion of the United States Court of Appeals for the Fifth Circuit must be reversed.

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IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court for the Southern District of Texas, Houston Division appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided this case was September 17, 2002.

No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C. §§ 2000e -2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§ 2000e - 2000e-17].

18 U.S.C. § 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), as amended, an employee may establish a *prima facie* case of retaliation when: 1) the employee has engaged in a protected activity; 2) the employer is aware of the employee's protected activity; 3) the employer subjects the employee to an adverse action contemporaneous or subsequent to the employee's protected activity; and 4) there is evidence of a causal connection between the employee's protected activity and the adverse action taken by the employer. The evidentiary burden then shifts to the employer to prove a legitimate, non-discriminatory reason for subjecting the employee to the adverse action that is not a mere pretext.

An employee has engaged in a protected activity if the employee has "opposed any practice made an unlawful employment practice by [Title VII]", or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a).

Petitioner, an African-American male employee of Exxon Chemical Americas, engaged in a protected activity of which Respondent, the successor ExxonMobil Chemical Company formed by merger on November 30, 1999 ("ExxonMobil"), was aware. On December 7, 1999, Petitioner filed a racial discrimination complaint with ExxonMobil against his supervisor, Mike Rosenberger ("Rosenberger"), alleging, *inter alia*, racial discrimination and racially disparate treatment in Rosenberger's performance evaluation and ranking of the Petitioner.

Petitioner also alleged that Rosenberger's discriminatory performance evaluation and ranking of the Petitioner adversely affected Petitioner's salary and opportunity for advancement. (Walter E. McDonald's December 7, 1999 complaint addressed to B.K. Townsend, Jr., Manager, Materials and Services Department, ExxonMobil Chemical Company contained in the record below.)

Subsequent to the Petitioner's racial discrimination complaint, ExxonMobil subjected Petitioner to an adverse employment action that was casually connected to his protected activity. By letter dated January 12, 2000, ExxonMobil offered Petitioner a job in the newly merged corporation, but, remarkably, the offer of employment was conditioned upon Petitioner accepting a position working directly for Rosenberger, the supervisor against whom Petitioner had filed a racial discrimination complaint with ExxonMobil on December 7, 1999. Petitioner's complaint, also, had not been resolved prior to ExxonMobil's offer of employment conditioned upon Petitioner working directly for the supervisor complained of. (ExxonMobil Chemical Headquarters Human Resources Manager David Clements' January 12, 2000 offer of employment letter addressed to Walter McDonald contained in the record below.) David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, testified in deposition that offering Petitioner a position working directly for the supervisor complained of "was the plan, yes." (David Clements' Dep. p. 43 contained in the record below.)

On January 24, 2000, the Petitioner informed ExxonMobil that ExxonMobil, by requiring Petitioner to work directly for the supervisor against whom Petitioner

had filed an unresolved racial discrimination complaint, had further contributed to a hostile working environment and that the related occupational stress was adversely affecting Petitioner's health. Petitioner wrote, "The racist and retaliatory nature of ExxonMobil's action against me is evident in the fact that ExxonMobil has never and would never assign a white woman to work for a man that she filed a sexual harassment or sexual discrimination complaint against." *See* Walter E. McDonald's January 24, 2000 letter addressed to W.H. Bennett, ExxonMobil Risk Management Services attached hereto at Appendix C.

On January 27, 2000, the Petitioner informed ExxonMobil that Petitioner had been examined at Sugar Land Family Physicians on January 26, 2000 and that Petitioner had been diagnosed, for the first time in his life, with high blood pressure with systolic blood pressure of 158 and diastolic blood pressure of 104.[1] A cardiologist prescribed medication to lower Petitioner's blood pressure and instructed that Petitioner be placed on medical leave for one month. *See* Walter E. McDonald's January 27, 2000 letter addressed to David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, and Cardiologist Work Absence/Disability Release Permit, attached hereto at Appendix D.

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[1] In Petitioner's prior annual examination, conducted by an Exxon Chemical Americas physician, Petitioner had systolic blood pressure of 138 and diastolic blood pressure of 80. (ExxonMobil medical records for Walter E. McDonald contained in the record below.)

Shortly thereafter, Petitioner was hospitalized and underwent heart cathorization surgery. On the Disability Report, which ironically was authorized on behalf of ExxonMobil by Rosenberger, the complained of supervisor, the cardiologist cited "Severe Occupational Stress!" *See* Individual Disability Report for Walter E. McDonald dated February 9, 2000 attached hereto at Appendix E.

On February 24, 2000, the Petitioner informed ExxonMobil that the cardiologist had determined that the Petitioner could return to work on March 13, 2000 under the limitation that Petitioner "avoid prior stressful working condition." *See* Walter E. McDonald's February 24, 2000 letter addressed to David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, and Cardiologist Work Absence/Disability Release Permit, attached hereto at Appendix F.

In spite of, and in direct contradiction to, the orders of the cardiologist, ExxonMobil informed Petitioner on March 2, 2000 that "there is no basis for the company to transfer you or Mr. Rosenberger to another position." ExxonMobil further subjected the Petitioner to adverse employment action when it stipulated that Petitioner's only alternative to continuing in a position working directly for the supervisor against whom Petitioner had filed a racial discrimination complaint, and to continuing in a work environment that was hostile and endangered Petitioner's health,[2] was for him "to retire." (ExxonMobil Chemical

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[2] In ExxonMobil employee brochures, ExxonMobil acknowledged that harassment and discrimination can cause stress and sickness, and that high blood pressure can cause heart attack, stroke, or kidney failure.

Headquarters Human Resources Manager David Clements' March 2, 2000 letter addressed to Walter McDonald contained in the record below.) Exxon Mobil constructively forced Petitioner to retire on March 30, 2000.

Petitioner timely filed a complaint setting forth a *prima facie* case of retaliation against ExxonMobil with the United States Equal Employment Opportunity Commission ("EEOC").

ExxonMobil, in its response to the EEOC, asserted as its sole defense that ExxonMobil's assigning Petitioner to work directly for Rosenberger could not be retaliation because, according to ExxonMobil, Petitioner had never submitted any claim of discrimination against Rosenberger prior to ExxonMobil's offer of continued employment. ExxonMobil asserted, "Mr. McDonald began to complain only after he was offered continued employment. Having been offered continued employment the he did not want, Charging Party began claiming discrimination." (ExxonMobil's Response to the EEOC contained in the record below.)

ExxonMobil knowingly and willfully made a false, fictitious and fraudulent statement to the EEOC in violation of 18 U.S.C. § 1001[3] regarding the crucial, central question

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(ExxonMobil employee brochures Working Together and The High Blood Pressure Story contained in the record below.)

[3] 18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or

in retaliation analysis of whether a charging party engaged in a protected activity prior to adverse action as required. ExxonMobil's January 12, 2000 letter to Petitioner clearly establishes that ExxonMobil offered Petitioner a job in the newly merged corporation working for Rosenberger on January 12, 2000, more than a month after Petitioner had filed a racial discrimination complaint against Rosenberger with ExxonMobil on December 7, 1999. On behalf of ExxonMobil, David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, wrote, "It is my understanding that Mike Rosenberger and Ken Townsend met with you [Petitioner] earlier today, January 12, and offered you a position with ExxonMobil Chemical Company." (ExxonMobil Chemical Headquarters Human Resources Manager David Clements' January 12, 2000 offer of employment letter addressed to Walter McDonald contained in the record below.)

Further, David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, testified in deposition that he was unaware of any job offer made to Petitioner by ExxonMobil prior to January 11, 2000.

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covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Remarkably, David Clements admitted in deposition that ExxonMobil's statement to the EEOC that Petitioner only complained about Rosenberger after Petitioner had been offered a job working for Rosenberger – ExxonMobil's sole defense to Petitioner's retaliation claim – was false. *See* David Clements' Dep. pp. 44-49 attached hereto as Appendix G.

ExxonMobil's bad faith in knowingly and willfully making a false, fictitious and fraudulent statement to the EEOC to avoid a finding of retaliation by the EEOC is further demonstrated by ExxonMobil's astonishing suggestion in its response to the EEOC that "the EEOC should investigate, pursuant to 18 U.S.C. § 1001, whether Charging Party [Petitioner] has knowingly made any materially false or fraudulent statements in his charge." (ExxonMobil's Response to the EEOC contained in the record below.)

It may be of interest to this Court that Petitioner has met with the EEOC to discuss referring the evidence of ExxonMobil's misconduct to the United States Attorney for Southern District of Texas for criminal prosecution of ExxonMobil for violation of 18 U.S.C. § 1001.

As ExxonMobil's sole defense to retaliation in its briefs submitted to the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Texas, Houston Division, ExxonMobil knowingly and willfully repeated the same false, fictitious and fraudulent statement that it had made to the EEOC to avoid a finding of retaliation by the EEOC.

Petitioner respectfully submits this Petition for Writ of Certiorari because, in spite of case law to the contrary, ExxonMobil obtained summary judgment via its false representations regarding the crucial, central question in retaliation analysis of whether a charging party engaged in a protected activity prior to adverse action.

REASONS FOR GRANTING THE PETITION

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), this Court considered the kind and the amount of evidence necessary to sustain a jury's verdict that an employer had engaged in unlawful discriminatory employment practices. Justice O'Connor delivered an opinion for the unanimous Court reversing the United States Court of Appeals for the Fifth Circuit, which had overturned the jury's verdict. This Court concluded that a jury's verdict that an employer had engaged in unlawful discriminatory employment practices may be sustained when a plaintiff-employee's case consists exclusively of: 1) a *prima facie* case of discrimination, and 2) sufficient evidence for a trier of fact to disbelieve the defendant-employer's purported legitimate and non-discriminatory explanation for its actions.

In *Reeves*, this Court found that plaintiff, through his trial testimony, had made a substantial showing that the employer's explanation for adverse action was false. In holding that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation," the Court stated:

> the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's

> dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992); *see also Wilson v. United States*, 162 U.S. 613, 620-621, 40 L. Ed. 1090, 16 S. Ct. 895 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. ed. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978) ("When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration").

530 U.S. at 147-148.

The present case presents an unresolved yet related question -- and indeed a more basic question: whether at the pre-trial stage, a court may grant summary judgment for an employer, and find that no jury could reasonably infer unlawful discriminatory employment practices, when a plaintiff-employee's case consists of: 1) a *prima facie* case of discrimination, and 2) the employer has admitted in deposition, and in employer documents, that its purported legitimate and non-discriminatory explanation is false, fictitious and fraudulent.

Petitioner respectfully submits the answer must be "No." The evidence in the present case that the employer's explanation is false is far stronger than the evidence that this Court found sufficient in *Reeves*. In *Reeves*, this Court found that the plaintiff had made a substantial showing that the employer's explanation for adverse action was false based upon the plaintiff's trial testimony alone. In the present case, the Court, let alone a prospective juror, need not rely upon Petitioner's testimony to reasonably conclude ExxonMobil's explanation for adverse action was false because, remarkably, ExxonMobil admits in deposition, and in an ExxonMobil document, that it explanation is false, fictitious and fraudulent. *See* ExxonMobil Chemical Headquarters Human Resources Manager David Clements' Dep. pp. 44-49 attached hereto as Appendix G (also David Clements' January 12, 2000 letter addressed to Walter McDonald contained in the record below.) If this Court affirmed that ExxonMobil's admission of mendacity in the present case does not defeat summary judgment for ExxonMobil, and is not sufficient for a jury to reasonably

infer unlawful discriminatory employment actions, it would be entirely, and incomprehensibly, inconsistent with this Court's sustaining the jury verdict in *Reeves* on merely circumstantial evidence of falsity originating from plaintiff without any direct admission from the employer.

The present case also presents an additional unresolved question: whether at the pre-trial stage, a court may grant summary judgment for an employer, and find that no jury could reasonably infer unlawful discriminatory employment practices, when the employer has admitted in deposition, and in employer documents, that the employer knowingly and willfully made a false, fictitious and fraudulent statement to the U.S. Equal Employment Opportunity Commission in violation of 18 U.S.C. § 1001 regarding the employer's explanation for adverse action.

Petitioner respectfully submits the answer must be "No." The EEOC is the fundamental, front-line structure for protection of the statutory rights of American workers. As this Court knows, an employee is generally required to first file any complaint of an unlawful discriminatory employment practice with the EEOC before the employee may file a civil action. Indeed, to the extent that the EEOC is able, the EEOC attempts to resolve employment disputes without resort to the courts. As reflected in criminal laws such as 18 U.S.C. § 1001, for the EEOC to be effective, the information provided to the EEOC must be true and accurate within the knowledge of the employer. However, because the EEOC has extremely limited, if any, authority to subpoena employer documents or to depose employer representatives, it is normally virtually impossible to

identify employer violations of 18 U.S.C. § 1001, and, consequently, employers are generally able to lie to the EEOC with impunity – begging the question of whether a guilty employer would ever submit truthful responses to a EEOC inquiry.

In the present case, remarkably, ExxonMobil has admitted in deposition and in an ExxonMobil document that it made a false, fictitious and fraudulent statement to the EEOC in violation of 18 U.S.C. § 1001 regarding its explanation for adverse action against the Petitioner. The effect of ExxonMobil's lie to the EEOC, made in order to avoid a finding of guilt by the EEOC, was to require the Petitioner to seek redress in the courts. It would be a perversion of the "system" set up for the protection of the American worker for this Court to permit ExxonMobil to continue to reap the benefits of this lie in the courts by affirming summary judgment for ExxonMobil that was granted on the basis of this repeated lie.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant a Writ of Certiorari.

Respectfully submitted,

Walter E. McDonald

Walter E. McDonald
Pro Se

Dated: 12/11/22

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

U.S. COURT OF APPEALS
FILED
SEP 17 2002
CHARLES R. FULBRUGE III CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20107
Summary calendar

WALTER E. MCDONALD
Plaintiff-Appellant,

versus

EXXONMOBIL CHEMICAL CO.,
Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-00-CV-4172

Before JOLLY, SMITH, and PARKER, Circuit Judges.

APPENDIX A

PER CURIAM:*

The Plaintiff-Appellant Walter E. McDonald ("McDonald") timely appeals from the district court's final judgment which dismissed with prejudice his Title VII claims for racial discrimination, age discrimination, and retaliation. He contends that the district court erred in granting summary judgment to the Defendant-Appellee ExxonMobil on each of his claims. We review de novo the district court's grant of summary judgment applying the same summary judgment standard as the district court. *See Walker v. Thompson*, 214F.3d 615, 624 (5th Cir. 2000).

After carefully considering the record evidence, the parties' briefs, and the applicable law, we AFFIRM the judgment of the district court for essentially the same reasons stated in the district court's January 9, 2002 summary judgment order.

AFFIRMED.

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47. 5. 4.

APPENDIX B

Opinion of United States District Court for the
Southern District of Texas, Houston Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALTER E. MCDONALD	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H -00- 4172
EXXONMOBIL	§	
CHEMICAL COMPANY	§	
	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the Court's order signed this date, the Court now believes that final Judgment should be entered. Therefore it is ORDERED that the plaintiff's claims and causes of action are DISMISSED with prejudice.

This is a FINAL JUDGMENT.
Signed this 9th day of January, 2002.

s/ _____
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALTER E. MCDONALD	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H -00- 4172
EXXONMOBIL	§	
CHEMICAL COMPANY	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is ExxonMobil Chemical Company's ("ExxonMobil") Motion for Summary Judgment (Dkt. #32). After considering the parties' arguments and the applicable law, the Court is of the opinion that the pending motion should be granted. Also pending before the Court is Walter E. McDonald's Motion for Leave to Depose Defendant's Expert Witness and to Supplement Plaintiff's Response to Motion for Summary Judgment (Dkt. #48). McDonald has also objected to the testimony of this expert, Dr. Randall Price, in its entirety. However, because the Court has not considered Dr. Price's testimony in reaching its decision on the pending motion, both McDonald's motion and his objections to Dr. Price's testimony are denied as moot. McDonald has also objected

to some of ExxonMobil's summary judgment evidence on the grounds of hearsay. The disputed evidence is not hearsay either because it is not being offered for the truth of the matter asserted or because the disputed statements were made by McDonald himself and thus constitute admissions by a party opponent. McDonald's objections to ExxonMobil's summary judgment evidence are overruled. Finally, ExxonMobil has moved to strike McDonald's affidavit offered in opposition to ExxonMobil's motion for summary judgment. In light of this order ExxonMobil's objections are overruled as moot.

FACTUAL BACKGROUND

When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in favor of the non-movant. *Samuel v Holmes*, 138 F.3d 173, 176 (5th Cir. 1998); *Texas v Thompson*, 70 F.3d 390, 392 (5th Cir. 1995). Therefore, in the procedural posture in which this case now comes before the Court McDonald's allegations may be summarized as follows:

McDonald, a sixty-one year African American man, was employed by Exxon for twenty-seven years. During that time he was a competent employee. However, around the time of Exxon's merger with Mobil McDonald began to

experience some friction with his supervisors, particularly Michael Rosenberger.[1]

Although it is difficult from both McDonald's complaint and his response to the pending motion to determine precisely what discriminatory acts McDonald claims he suffered at the hands of Rosenberger, there appear to be a few primary incidents with which McDonald takes umbrage. First, Kay Wheeler, a younger, white employee, was given an award ceremony recognizing her

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[1] ExxonMobil is apparently convinced that the real reason for McDonald's sudden dissatisfaction with Rosenberger and his subsequent complaint of discrimination is ExxonMobil's decision to offer McDonald continued employment with the merged company instead of an attractive severance package and early retirement. However, the question before the Court is not what motivated McDonald in initiating the present dispute but what motivated ExxonMobil in taking the contested employment actions. McDonald in turn argues at length that ExxonMobil lied to the EEOC by claiming that McDonald did not complain about discrimination until after he was informed that would not be discharged and would not receive a severance package, when in fact, McDonald's complaints predated the decision to continue his employment with ExxonMobil. McDonald asserts that this actions and warrants a denial of summary judgment under *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S.133 (2000). However, even if ExxonMobil did lie to the EEOC about when it offered McDonald continued employment, a highly dubious claim, this lie was unrelated to ExxonMobil's asserted reasons for its employment decisions and is irrelevant to the Court's decision on the pending motion.

superior job performance in which she received a plaque of unknown value and a $50.00 gift certificate. McDonald claims that although his job performance was just as good as Wheeler's he received no award, no ceremony, and no gift certificate. Rosenberger claims that he did not

nominate McDonald for an award because Rosenberger believed that McDonald did not desire any public recognition for his accomplishments and had actually made light of such awards in the past. Second, McDonald claims that Rosenberger gave him lower job evaluations than other employees because of McDonald's race and/or age. Third, McDonald advances the novel argument that ExxonMobil discriminated against him by choosing to continue his employment with the merged entity instead of firing him and giving him a severance package. Finally, McDonald claims that the aforementioned abuse and discrimination was so opprobrious that is caused him to develop high blood pressure. Then, in retaliation for complaining about Rosenberger's discriminatory conduct, ExxonMobil required McDonald to continue working for Rosenberger despite its knowledge of McDonald's medical condition. Instead of continuing to work for ExxonMobil McDonald chose to retire. McDonald also claims that Rosenberger made a number of comments critical of affirmative action

which McDonald interpreted as demonstrating Rosenberger's racial animus.[2]

McDonald has asserted causes of action for race discrimination and retaliation under Title VII and age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*[3] ExxonMobil has moved for summary judgment arguing that none of the complained of employment decisions are actionable under Title VII or the ADEA and even if they are, McDonald has no evidence to refute ExxonMobil's legitimate, non-discriminatory

reason for those decisions.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on

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[2] Rosenberger also made a number of derogatory statements relating to the sexual preferences of female basketball players. While these statements would be relevant in a case involving sexual harassment or discrimination McDonald is a man and has not raised any claim for sex discrimination. Therefore, these comments are irrelevant to the present lawsuit.

[3] In his initial complaint McDonald also asserted a cause of action for state law intentional infliction of emotional distress. McDonald has since dropped his intentional infliction of emotional distress claim.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R CIV. P. 56(c); *see also Christopher Village, LP v Retsinas*, 190 F.3d 310, 314 (5th Cir. 1999). "For any matter on which the non-movant would bear the burden of proof at trial ... the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Transamerica Ins. Co. v Avenell*, 66 F.3d 715, 718-19 (5th Cir. 1995); *see also Celotex Corp. v Catrett*, 477 U.S. 317, 323-25 (1986). To prevent summary judgment, the non-movant must "respond by setting forth specific facts" that indicate a genuine issue of material fact. *Rushing v. Kansan City S. Ry.*, 184 F.3d 496, 505 (5th Cir. 1999).

The nonmovant cannot avoid summary judgment by presenting only "conclusory allegations" or "unsubstantiated assertions," such as the bare allegations of a complaint, but must present sufficient evidence, such as sworn testimony in a deposition or affidavit to create a genuine issue or material fact as to the claim asserted. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 994) (en banc).

ANALYSIS

I. Title VII

A. Race Discrimination

1. Title VII Standard. The prima facie elements of a plaintiff's claim under Title VII are: 1.) That he belongs

to a protected group, 2.) That he was qualified for the disputed employment

benefit, 3.) That, despite his qualifications, he suffered an adverse employment action, and 4.) That similarly situated employees outside his protected class were treated more favorably. *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 & n. 13 (1973). Once the plaintiff establishes a prima facie case the burden shifts "to the employer to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802. In the present case ExxonMobil claims that McDonald's accomplishments were not publicly recognized because his supervisor did not believe that McDonald wanted public recognition and that McDonald was retained at ExxonMobil in Rosenberger's department because he was the best man for the job. The plaintiff must then demonstrate that the proffered legitimate, nondiscriminatory reason is merely perpetual. *Id.* at 804. Further, "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. " *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147 (2000).

2. Failure to Publicly Recognize Accomplishments. McDonald's first complaint is that he did not receive the same recognition as Wheeler because he never received any public commendation for his work performance. Wheeler was the employee in McDonald's group to receive an

award. *Rosenberger Aff.* ¶ 15. ExxonMobil's failure to give McDonald a public ceremony, a plaque, and $50.00 gift certificate does not constitute actionable discrimination under Title VII especially in light of the fact that only one employee in McDonald's workgroup received such an award. Title VII is intended to balance the employee's right to be treated fairly in the workplace with the employer's need to operate its business free from constant litigation and judicial interference. Therefore, not every perceived slight or petty injustice is actionable under Title VII. To be actionable under Title VII an employment decision must affect an employee's status, benefits, or responsibilities. *See Shackelford v DeLoitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999).

There is no evidence that not having his accomplishments publicly lauded caused McDonald to suffer any consequences more serious than hurt feelings and a bruised ego.

Even if Rosenberger's refusal to publicly recognize McDonald's achievements was actionable under Title VII, McDonald has offered no evidence that would cast doubt on the veracity of Rosenberger's asserted reason for not publicly recognizing McDonald's accomplishments. An employer's subjective belief about an employee's job performance, even if mistaken, constitutes a legitimate reason for an adverse employment decision. *Mayberry v Vought Aircraft. Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). The same logic applies here. Rosenberger claims that he

believed McDonald would not want a public award ceremony because on a previous occasion when McDonald had been nominated for an award he had been reluctant to accept. *Rosenberger Aff.* ¶15. Although McDonald now asserts that the award was important to him, he has introduced no evidence to cast doubt on Rosenberger's claim that he did not believe McDonald would want an award.

3. Negative Job Evaluations. McDonald also asserts that Rosenberger gave him negative employment evaluations. However, McDonald was actually rated slightly higher by Rosenberger that he had been by his previous supervisor. In addition, McDonald has offered no evidence that other, similarly situated employees received higher evaluations. In order to show disparate treatment a plaintiff must prove that his employer "gave preferential treatment to [another] employee under nearly identical circumstances." *Okoye v Univ. of Texas Health Sci. Ctr.*, 245 F. 3d 507, 514 (5th Cir. 2001) (quoting *Little v Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991) (internal quotation marks omitted)). McDonald has presented no evidence of his comparative job performance other than his own conclusory allegations that the quality of his work was as good as or better than that of his colleagues. Unsubstantiated allegations and conclusory statements are insufficient to support a claim of discrimination. *Grimes v. Texas Dep't of Mental Health & Mental*

Retardation, 102 F.3d 137, 139 (5th Cir. 1996). The only other evidence supporting a claim of racial bias in McDonald's workplace was a number of comments by Rosenberger in which Rosenberger expressed his opposition to affirmative action. Affirmative action is an issue of significant social and political importance on which well-meaning men may legitimately disagree. Although it may be prudent to keep such controversial topics out of casual workplace conversation, a supervisor's opposition to (or, for that matter, support of) affirmative action, without more, cannot be reasonably construed as demonstrating hostility towards people of any particular racial extraction. McDonald simply has not presented sufficient evidence to cast doubt on the asserted basis for his low evaluations and there is no evidence suggesting that Mc Donald's low job evaluations were the result of racial bias.

B. Retaliation

1. Retaliation Standard. To prove unlawful retaliation an employee must prove: "(1) the employee engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action." *Thomas v. Texas Dep't of Criminal Justice*, 220 F.3d 389, 394 (5th Cir. 2000). The same shifting sequence of evidentiary production that applies in discrimination cases applies to retaliation claims as well. *Zanders v. Nat'l R.R. Passenger*

Corp., 898 F.2d 1127, 1134 (6th Cir. 1990). In addition, a retaliation plaintiff must show that he had a reasonable and good faith belief that the employment practice he protested was in fact prohibited by Title VII. See *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1267 (5th Cir. 1992).

2. Failure to Fire. Normally a corporate merger and the attendant threat of mass layoffs is a matter of great trepidation and concern for long-term employees. In addition, typical Title VII plaintiffs usually assert that they were *discharged* because of their race, age sex or religion. In this

case, however, it appears that McDonald actually would have preferred termination to continued employment and now asserts that ExxonMobil's decision to retain him after the merger, preventing him from receiving a severance package, was a violation of Title VII. It is very doubtful that a "failure to fire" claim is actionable under Title VII. Refusing to fire an employee is not an adverse employment action as that term has traditionally been understood. In fact, to recognize such a cause of action would put employers in an impossible "damned if you do, damned if you don't" position as they could be subject to Title VII liability regardless of the employment decision made.[4]

---

[4] In addition, in order to show pretext on his failure to fire claim it seems that McDonald would, rather perversely, have to show that he was unqualified for his job.

However, even assuming ExxonMobil's decision to retain McDonald is somehow actionable under Title VII, McDonald's claim would still fail because everyone in McDonald's work group was offered continued employment with ExxonMobil. *Rosenberger Aff.* ¶ 30. Employees cannot complain that they have been discriminated against when they have received the same treatments as their colleagues and coworkers.

3. Constructive Discharge. Finally, McDonald argues that ExxonMobil forced him to retire by compelling him to work with Rosenberger after he had filed a complaint of discrimination naming Rosenberger as primary discriminator and after ExxonMobil was aware that the stress from the friction between Rosenberger and McDonald was causing McDonald to suffer sever high-blood pressure. To prove constructive discharge,

> [A]in employee mist offer evidence that the employer made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign ...Whether a reasonable employee would feel compelled to resign depends on the facts of each case, but [the following factors are relevant], singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering,

> harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offer of early retirement on terms that

> would make an employee worse off whether the offer was accepted or not.

Barrow v New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir. 1994). In addition, "[A] constructive discharge claim requires a 'greater severity or pervasiveness of harassment that the minimum required to prove a hostile work environment.'" *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998) (quoting *Landgraf v. USI Film Prods.*, 968 F.2d 27, 420 (5th Cir. 1992)). McDonald claims that ExxonMobil harassed him by transcribing the messages he left on Rosenberger's voice mail, asking him when he would return to work after doctor's appointments, attempting to increase his work load, monitoring the times at which he entered and left his building, and criticizing his refusal to cooperate during the course of ExxonMobil's internal investigation off his complaint. By Title VII standard this "harassment" was extremely tepid. McDonald was never subjected to any sort of insulting or derogatory behavior nor was he ever threatened or otherwise abused. ExxonMobil had ever right to transcribe McDonald's voice mail messages to Rosenberger: "Reasonable defensive measures do not violate Title VII, even though such steps are adverse to the charging

employee and result in differential treatment." *United States v. New York City Transit Auth.*, 97 F.3d 672, 677 (2nd Cir. 1996). In addition, ExxonMobil's decision to monitor McDonald's entry into its building and inform Rosenberger of McDonald's comings and goings cannot be viewed as unreasonable in light of McDonald's statement in one of his voice mail messages to Rosenberger that he would "kick some serious butt." An employer may well have legitimate security concerns regarding an employee who has filed an EEOC complaint and obviously feels that he has been mistreated by his supervisor. As long as the employer's addition security measures are reasonable, non-intrusive, and not calculated to harass, embarrass, or humiliate the employee they do not constitute retaliation for Title VII purposes. In fact, in one of his later voice mails to Rosenberger, McDonald admitted that some of the comments he made in his earlier messages were inappropriate.

The other acts McDonald complains of, such as inquiring when he would return to work after a doctor's appointment and slightly altering some of his job duties are normal, routine business matters and cannot be interpreted as retaliatory especially when viewed in the context of a corporate merger. ExxonMobil's handling of McDonald after his complaint did not even approach the level of oppression necessary for a claim of constructive discharge and McDonald's unfortunate and extreme reaction to his

environment cannot be attributed to any conduct on the part of ExxonMobil or McDonald's supervisors.

II. Age Discrimination

Because "the same evidentiary procedure for allocating burdens of production and proof applies to discrimination claims under both [Title VII and the ADEA]" McDonald's claims under the ADEA are without merit for the same reasons as his claims under Title VII. *Brown v. Bunge Corp.*, 207 F.3d 776, 781 (5th Cir. 2000).

CONCLUSION

For the foregoing reasons, ExxonMobil's Motion for Summary Judgment is GRANTED as to all of McDonald's claims.

It is so ORDERED
Signed this 9th day of January, 2002.

s/ _____
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

Walter E. McDonald's January 24, 2000 letter addressed to
W.H. Bennett, ExxonMobil Risk Management Services

January 24, 2000

To: W.H. Bennett
ExxonMobil Risk Management Services

From: Walter E. McDonald s/
Office (281) 870-6181

Subject: Forced Unhealthy Working Environment

My family and I hold Mr. Lee T. Raymond, Chairman of the Board of ExxonMobil Corporation, responsible for the unhealthy environment in which I am being forced to try to work and any and all affects on my health that may result from this unhealthy working environment. I have been assigned by ExxonMobil, with Mr. Raymond's full knowledge, to work for a person that I filed a racial discrimination complaint against: a person who told me that my ranking was influenced by past racial discrimination and spoke about it as if I should not be surprised. **This assignment was made after the merger and 36 days after I filed the complaint.**

It is an established fact that "Racial and/or Sexual harassment and Racial and/or Sexual discrimination create an intimidating, hostile working environment that disrupts an individual's ability to pursue normal living and professional activities." **The racist and retaliatory nature of ExxonMobil's action against me is evident in the fact that ExxonMobil has never and would never assign a**

white woman to work for a man that she filed a sexual harassment or sexual discrimination complaint against.

The blatant racist and retaliatory nature of this assignment compounds the stress that normally results from an environment of Racial and/or Sexual harassment and Racial and/or Sexual discrimination. Just thinking about being forced to try to work for a person who admitted discriminating against me produces stress that keeps me awake at night and d causes my head and/or stomach to hurt. When I am at work, thinking about it causes me to have headaches and/or stomachaches and negatively affects my ability to focus and concentrate.

Mr. Raymond has been personally informed of my racial discrimination complaint, the disrespect and negatively bias treatment I received when I pursued resolution of this complaint, the assignment I received after I filed the complaint, and the affects that this assignment is having on my health and my ability to focus and concentrate. To date, ExxonMobil has done nothing to take me out of this unhealthy working environment. I am currently taking medicine to try to cope with the headaches and the stomach problems. There is nothing that I can do to cope with the sleepless nights or the lack of ability to focus and/or concentrate. **There is nothing that I can do to eliminate or control the affects of the stress inherent in this intimidating, hostile working environment in which ExxonMobil is forcing me to try to work.**

Since your inquiry resulted from my January 18, 2000 letter to Mr. Raymond, I am copying him and D.W. Clements and J.S. Griffiths.

C: David W. Clements
J.S. Griffiths
Lee Raymond

APPENDIX D

Walter E. McDonald's January 27, 2000 letter addressed to David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, and Cardiologist Work Absence/Disability Release Permit

January 27, 2000

To: Mr. D.W. Clements, Manager
Human Resources
ExxonMobil Chemical Company
Room L3-540

From: Walter E. McDonald s/

Subject: Permit from My Cardiologist for One Month of Medical Leave

I was treated at Sugar Land Family Physicians for symptoms of migraine and/or stress related headaches Wednesday, January 26, 2000. As I have indicated to ExxonMobil several times, I had been experiencing these headaches for more than a month. During the examination, my blood pressure was taken several times and each time it was 150+/100+. This was very surprising and great cause for concern for two reasons (1) I have no medical history of high blood pressure, and (2) high blood pressure is a very serious problem for African-American males and should not be taken lightly. I was given medication and kept in the doctor's office until my blood pressure was reduced to normal levels. The doctor at Sugar Land Family Physicians prescribed rest and medication to be taken nightly to attempt to restore my blood pressure to normal level.

After I left Sugar Land Family Physicians, I immediately made an appointment with my cardiologist for this morning. After a thorough examination and a discussion of

my work situation during the last month he told me to continue taking the medication to lower my blood pressure and gave me a permit for one month of medical leave. This permit is attached. I have an appointment to see him after on month to see if my blood pressure has stabilize at normal levels.

It should be obvious that I do not intend to be forced back into the work environment that led to my current health situation. I am a reasonable man. I would like to know what ExxonMobil proposes as a resolution of my situation before February 4, 2000. I can be reached at home. I would prefer to avoid a legal solution.

C: J.S. Griffiths
M.E. Rosenberger

NON-INVASIVE CARDIOVASCULAR
ASSOCIATES, INC.

GLOVER O.L. JOHNSON, M.D.
7500 BEECHNUT
SUITE 286
HOUSTON, TEXAS
77074
(713) 774-2909
Fax 774-3429

WORK/SCHOOL ABSENCE/DISABILITY RELEASE PERMIT

TO: Exxon-Mobil
(Name of Company/Supervisor)

Walter E. McDonald, was examined and treated
(Name of Employee)
1-27-00 by Glover O. L. Johnson, Jr. M.D.
(Date)

He/~~She~~

___ May return to regular activities.
___ May return to regular activities with the following treatment: _____
___ May return to work/school with the following limitations: _____
__X__ May not return to **work/~~school~~** until: **1 month**
___ Requires follow-up visit: _____

s/_____
Glover O.L. Johnson, Jr., M.D.
1-27-00
Date

APPENDIX E

Individual Disability Report for Walter E. McDonald
dated February 9, 2000

INDIVIDUAL DISABILITY REPORT This is not an insurance form

I. TO BE COMPLETED BY EMPLOYEE'S DEPARTMENT

EMPLOYEE NAME (FIRST, MIDDLE INITIAL, LAST)

WALTER E. MCDONALD

SOCIAL SECURITY NUMBER

455-58-1266

DEPARTMENT NAME & PAYROLL LOCATION

POLYETHYLENE/OPERATIONS/RAIL ASSET MGMT.

FIRST DAY OF DISABILITY

1-14-00

JOB TITLE

SR. STAFF NEGOTIATOR

TYPE OF DISABILITY

___ OCCUPATIONAL INJURY

___ NON-OCCUPATIONAL INJURY

X SICKNESS

AUTHORIZED DEPARTMENT SIGNATURE

s/ M.E. ROSENBERGER

PHONE	DATE
870-6217	2-4-00

APPENDIX E

TO BE COMPLETED BY EMPLOYEE

I hereby authorize the attending physician to release the information requested below to determine my eligibility for payment under the company's disability plan. I understand this information must be provided within thirty (30) days or disability payments may be withheld.

EMPLOYEE'S SIGNATURE s/ WALTER E. MCDONALD

DATE 2/9/00

PHONE (281) 343-8865

TO BE COMPLETED BY ATTENDING PHYSICIAN

PRESENTLY DISABLED

X YES ___ NO

If not totally disabled, please list restrictions and their duration. Light duty may be available. _____

If totally disabled, please estimate return to full duty Unknown
Date

Last Treatment 1-27-00
Date

_____
SIGNATURE OF ATTENDING PHYSICIAN
s/ Glover O. L. Johnson, Jr. M.D.

ADDRESS
7500 Beechnut #286--HOUSTON, TEXAS 77074

PHONE
(713) 774-2909

DATE
2-9-00

PHYSICIAN: PLEASE DETACH THIS SECTION: GIVE TO THE EMPLOYEE FOR RETURN TO THEIR SUPERVISOR

HISTORY

_____

DIAGNOSIS

SEVERE OCCUPATIONAL STRESS!

TREATMENT

MEDICAL LEAVE _____

ADDITIONAL MEDICATION _____

APPENDIX F

Walter E. McDonald's February 24, 2000 letter addressed to David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, and Cardiologist Work Absence/Disability Release Permit

February 24, 200

To: Mr. D.W. Clements, Manager
Human Resources
ExxonMobil Chemical Company
Room L3-540

From: Walter E. McDonald

Subject: MEDICAL RELEASE

Attached is a statement from my cardiologist giving me medical release to return to work Monday, March 13, 2000. He strongly recommends that I do not return to the stressful working environment that caused my health problems. This obviously makes it imperative for my family and me to make a decision regarding my working future by March 15, 200 with primary emphasis on my health.

I am flying to Philadelphia next Tuesday, February 29, 2000, to discuss this entire matter in depth with my son. I will be at his home Wednesday, March 1, 2000 (215) 627-4964. We have meetings scheduled in New York on Thursday and possibly Friday. I will return to Houston on Sunday, March 5, 2000.

I can come to your office tomorrow afternoon (2/25) and pick up any reports that I need to review. I can read them over the weekend and return them to you on Monday, February 28, 2000. If this cannot e accomplished, I will have to address these reports on Monday, March 6, 2000, after I return from Philadelphia.

I sincerely hope that this entire matter can be resolved inside ExxonMobil.

s/ Walter E. McDonald

APPENDIX F

NON-INVASIVE CARDIOVASCULAR
ASSOCIATES, INC.

GLOVER O.L. JOHNSON, M.D.
7500 BEECHNUT
SUITE 286
HOUSTON, TEXAS
77074
(713) 774-2909
Fax 774-3429

WORK/SCHOOL ABSENCE/DISABILITY RELEASE PERMIT

TO: Exxon-Mobil
(Name of Company/Supervisor)

Walter E. McDonald, was examined and treated
(Name of Employee)
2-24-00 by Glover O. L. Johnson, Jr. M.D.
(Date)

He/~~She~~

_X_ May return to regular activities. – **3-13-00!**

___ May return to regular activities with the following treatment: _____

_X_ May return to work/school with the following limitations: **Avoid prior stressful working environment**

___ May not return to **work/~~school~~** until: _____

___ Requires follow-up visit: _____

s/_____
Glover O.L. Johnson, Jr., M.D.
2-24-00

APPENDIX G

Deposition of David Clements, ExxonMobil Chemical Headquarters Human Resources Manager, pp. 44-49

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALTER E. MCDONALD	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	H -00- 4172
EXXONMOBIL	*	JURY
CHEMICAL COMPANY	*	

****

ORAL AND VIDEOTAPED DEPOSITION OF
DAVID WARREN CLEMENTS
JULY 12, 2001

****

THE ORAL AND VIDEOTAPED DEPOSITION OF DAVID WARREN CLEMENTS, duly sworn, produced as a witness at the instance of the Plaintiff, Walter E. McDonald, was taken in the above-styled and numbered cause on the 12th day of July, 2001, from 10:02 am to 2:30 p.m., before Irma L. Reyes, CSR in and for the State of Texas, reported by machine shorthand, at the Offices of ExxonMobil Chemical Company, 13501 Katy Freeway, Houston, Texas, pursuant to Notice, the Federal Rules of Civil Procedure and the provisions stated on the record.

MR. RIVET: Or a possibility? I'm -- I'm not sure – objection, vague and ambiguous.

A. What I first heard is that consideration was being given to offering Mr. McDonald a job and that, indeed the company was trying to determine who was available to go do that type of work and was it appropriate to offer Mr. McDonald a job or not.

Q. (By Mr. Epperson) Just one more question on that, sir.

A. There were some – there were some -- several people that were – that the company was considering, as I understand it, as far as who was available; and they were trying to fill the jobs but hadn't been able to come to total closure on it.

Q. All right. And your – your letter says: It is my understanding that Mike Rosenberger and Ken Townsend met with you today, January 11th actually there's a – your letter is dated January the 12th; but you referred to a meeting that Mr. Rosenberger and Mr. Townsend had with Mr. McDonald on January the 11th. Do you know of any job offer following or in connection with the merger that was made to Mr. McDonald before this January the -- January the 11th, 2000, job offer?

A. No, sir.
Q All right. All right. Now, you referred earlier to the – to the first letter that Mr. McDonald sent concerning his race discrimination claims, and I'm going to hand you what's been marked Plaintiff's Exhibit 3, sir, and ask you – I'll represent to you that this is that letter.
MR. RIVET: Woody, if you don't mind, I want to give him a better copy. Is that okay?
MR. EPPERSON: Sure.
Q. (By Mr. Epperson) I'll – I'll represent to you that this is the – a – copy of the December 7th, 1999, letter that we talked about earlier where Mr. McDonald first made his claims of race discrimination. Can you identify this – this letter?
A. This appears to be that letter.
Q. All right sir, sir. And – and –
A. Certainly a copy of it.
Q. Yes, sir. And this is the one you talked about earlier that Mr. Townsend and – and you discussed.
A. Mr. Townsend provided me with a copy of this.
Q. And it was – this letter is dated December

the 7th, 1999. Is it your recollection that – that you and Mr. Townsend discussed this shortly after or within a few days of December 7th?

A. Yes. Yes, sir.

Q. All right. What is – who was – who was Mr. McDonald's manager at Exxon in 1999?

A. I would say that it was Mr. Needles, Warren Needles.

Q. Was – was Mr. Rosenberger his immediate supervisor, or how – how did Mr. Rosenberger fit into the – the management picture?

A. I think at one time he was his team leader and then became his supervisor.

In – in 1999?

I'm not sure that I know the timing of when all that happened.

Q. Is -- is it fair to say that – that Mr. Rosenberger did – did supervise Mr. McDonald in 1999?

A. That's my understanding.

Q. All right

A. Yes sir.

Q. All right

I'm going to hand you a letter marked Plaintiff's Exhibit 22. I'll represent this is

the – the – or a response ExxonMobil filed with the Equal Employment Opportunity Commission. It appears to be signed by ExxonMobil Chemical Company's attorney, Mr. Beck. I'm going to ask you some questions about it.

I – I notice on the initial disclosure – May – may I have a moment to read it, please.

Q. Take – take your time, sir.

A. (Witness examining document.) Okay.

Q. All right, sir. You've had an opportunity to review this – this Plaintiff's Exhibit 22. Can you identify that for us, sir?

A. It's a response from the company to the EEOC dated August 10, 2000.

Q. Does it appear to have been set or signed by Mr. Beck?

A. It does.

Q. In its initial disclosure of – of persons with knowledge of relevant facts, Exxon has not identified Mr. Beck; and that may well be because it's – he's functioning as – as a lawyer. And – and I'm not going to ask you anything about attorney-client communications, and – and I know

your lawyer will object if -- if anything I ask happens to stray in that area. I don't mean to do that.

All I'm trying to find out sir, is – look at – look at the second paragraph of Mr. Beck's letter, the – the last couple of lines where it says – refers to a complaint that – Mr. McDonald's complaint against the company. And then the last phrase – and it is – and I'll read it: "a complaint he filed only after being offered a position with the … company."

Now based on Plaintiff's Exhibit 20 – 21, which seems to confirm that Mr. McDonald was offered a job by Mr. Rosenberger or Mr. Townsend on January the 11th, 2000, and Plaintiff's Exhibit 3, which is the December 7th, 1999, letter, which predated the job offer by five or six weeks, can you tell me how Mr. Beck got the erroneous information that Mr. McDonald filed his complaint only after being a job – offered a job with the company?

A. No.

Q. Okay. Do you know who at ExxonMobil Chemical might be able to give me that information?

A. No.

Q. All right, sir. In the – one more question.

about Mr. Beck's letter. The first paragraph – the last sentence of the first paragraph says:
"Mr. McDonald began to complain only after he was offered continued employment."
Do – do you see where I've read that, sir?
A. Yes.
Q. That appears to be incorrect, doesn't it, sir?
A. It appears to be.
Q. And – and, again, you don't know how Mr. Beck got this incorrect information?
A. I – no, I don't.
Q. Let's go back – a few more questions about Plaintiff's Exhibit 3. That's the December 7th, 1999, letter where Mr. McDonald first complains about racial discrimination.
MR. RIVET: No. I believe he wants Exhibit 3.
THE WITNESS: Which –
MR. RIVET: This one here.
Q. (By Mr. Epperson) And I'll invite your attention to the very first sentence in Mr. McDonald's December 7th, '99, letter. I'll read it.
"I am convinced that my ranking and

FILED
DEC 30 2002
OFFICE OF THE CLERK

No. 02-923

IN THE

Supreme Court of the United States

WALTER E. MCDONALD,
Petitioner

v.

EXXONMOBIL CHEMICAL COMPANY

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Walter E. McDonald
Pro Se
6602 Knoll Park Drive
Sugar Land, Texas 77479
281-343-8865

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Although Respondent ExxonMobil Chemical Co. ("ExxonMobil"), by its letter dated December 18, 2002 and addressed to the Clerk of the Court, has formally waived its right to file a brief in opposition to the Petition for Writ of Certiorari and, pursuant to Supreme Court Rule 15.2, has waived any and all objections to, and any and all arguments against, the Petitioner's Questions Presented, Petitioner's Statement of the Case, and the Petitioner's Reasons for Granting the Writ, ExxonMobil nevertheless suggests in its same letter that the Petition should be denied for reasons allegedly articulated by District Court Judge Rainey. Since ExxonMobil apparently seeks to adopt by reference reasons allegedly articulated by District Court Judge Rainey rather than affirmatively presenting to this Court any argument of ExxonMobil's own, the Petitioner respectfully submits this short Reply Brief in order to address the solitary reference made by District Court Judge Rainey related to Petitioner's Questions Presented to this Court of whether a court may grant summary judgment to an employer when: 1) a plaintiff-employee has presented a *prima facie* case of an unlawful discriminatory employment practice and, 2) the employer has admitted in deposition, and employer documents, that the employer's purported legitimate and non-discriminatory explanation for adverse action against the plaintiff-employee, which the employer reported to the U.S. Equal Employment Opportunity Commission ("EEOC"), is false, fictitious and fraudulent.

District Court Judge Rainey's sole acknowledgment of the Questions Presented to this Court is in the form of Footnote 1 to his decision. Rather than providing any basis for denying the Petition, however, Judge Rainey's footnote only proves the following beyond any doubt:

1) ExxonMobil asserted as its *sole defense* to Petitioner's *prima facie* case of retaliation that its offer to Petitioner of continued employment in the newly merged corporation, conditioned upon the Petitioner working for Mike Rosenberger, could not have been in retaliation for the Petitioner's complaint of racial discrimination filed against Rosenberger because, *according to ExxonMobil*, Petitioner only first complained about Rosenberger *after* ExxonMobil had offered Petitioner a position working for Rosenberger. ExxonMobil asserted this defense because, as this Court knows, there can be no retaliation claim where the plaintiff has not engaged in protected activity *prior to*, and related to, the complained of allegedly "retaliatory" adverse action. Judge Rainey commented, "ExxonMobil is apparently convinced that the real reason for McDonald's sudden dissatisfaction with Rosenberger and his subsequent complaint of discrimination is ExxonMobil's decision to offer McDonald continued employment." Judge Rainey's comment confirms that ExxonMobil asserted to the District Court, as it previously had asserted to the EEOC, that the Petitioner only complained *subsequent* to ExxonMobil's offer of continued employment working for Rosenberger.

However, as fully explained in the Petition, ExxonMobil's admissions in deposition and in ExxonMobil documents clearly establish that Petitioner filed a complaint against Rosenberger with ExxonMobil more than a month *before* any offer of continued employment and that ExxonMobil's sole defense to the Petitioner's *prima facie* case of retaliation was knowingly and willfully false, fictitious, fraudulent and a blatant lie.

2) Judge Rainey failed as a matter of law and of consistency with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), and failed in the context of the summary judgment standard, to properly analyze the uncontroverted evidence – the admissions on the part of ExxonMobil – that ExxonMobil's sole defense to Petitioner's *prima facie* case of retaliation was knowingly and willfully false, fictitious, fraudulent and a blatant lie. Remarkably, in spite of, and in direct contradiction to, ExxonMobil's admissions that its defense had been a blatant lie, Judge Rainey, for reasons unexplained and about which Petitioner can only speculate, asserted that it was "highly dubious" that ExxonMobil lied. In stark contrast to Judge Rainey's comment, it appears that even ExxonMobil, by its choice to waive its right to file a brief in opposition to the Petition, is now uncomfortable with making any affirmative and direct argument to this Court that it did not lie -- let alone claiming it is dubious that it lied -- in the face of evidence only to the contrary. Judge Rainey acknowledged Petitioner argued at length that summary judgment for ExxonMobil was inappropriate under *Reeves* given the clear evidence of ExxonMobil's lie.

Under these circumstances, Judge Rainey's comment that "even if ExxonMobil did lie to the EEOC ... this lie was unrelated to ExxonMobil's asserted reasons for its employment decisions and is irrelevant to the Court's decision on the pending motion" only further demonstrates that Judge Rainey misapplied the analytical framework set forth by this Court in *Reeves*, or Judge Rainey failed to apply the *Reeves* framework altogether.[1]

This Court should grant a Writ of Certiorari for the reasons fully set forth in the Petition, and to make it unmistakably clear to courts that it is inappropriate, and a perversion of the system and the laws established to protect American workers, for a court to grant summary judgment to employers who have knowingly and willfully presented false, fictitious and fraudulent explanations for their adverse employment actions to the EEOC and to the courts.

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[1] ExxonMobil's lie is clearly related, as evidenced by the facts that: 1) the lie, if believed, negates the *required* retaliation element that the Petitioner must have engaged in protected activity *prior to* complained of adverse action, 2) ExxonMobil has continuously repeated this lie to the EEOC and the courts, 3) ExxonMobil has steadfastly refused to recant this lie although it has not refuted the evidence that it is a lie, and 4) ExxonMobil does not contest Petitioner's characterization of this lie as ExxonMobil's *sole defense*.

Such employers should be prosecuted to the fullest extent of the law under 18 U.S.C. § 1001, and counsel who aid and abet them should be disciplined by the bar of the court, rather than rewarded for their callous trampling of the rights of American workers.

Respectfully submitted,

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Pro Se

Dated: 12/27/02